NGOI THIAM WOH

v.

CTOS SDN BHD & ORS

HIGH COURT MALAYA, IPOH
ABDULL HAMID EMBONG J
[CIVIL SUIT NO: 22-87-2001]
30 AUGUST 2001

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Interim injunction to restrain publication of allegedly defamatory materials - Conditions for granting - Whether must show materials prima facie libellous, untrue and malicious - Effect of defences of justification, fair comment and privilege - Effect of delay in applying for injunction - Applicant's failure to provide undertaking as to damages*

CIVIL PROCEDURE: *Mode of commencement - Interlocutory injunction, application for - Whether must be by way of summons - Whether fatal of by inter partes originating motion - Rules of the High Court 1980, O. 29 r. 1(2)*

TORT: *Defamation - Interlocutory injunction to restrain publication - Conditions for granting - Whether must show materials prima facie libellous, untrue and malicious - Effect of defences of justification, fair comment and privilege - Effect of delay in applying for injunction - Applicant's failure to provide undertaking as to damages*

The plaintiff had sought damages for defamation and injunctive relief against the defendants with respect to a proclamation of sale published by the 2nd defendant Star Publications ('the Star') and picked up by the 1st defendant ('CTOS'), an information database company, for inclusion in its electronic archive for worldwide access. The plaintiff through the instant application prayed for an interlocutory injunction to restrain the defendants from publishing the proclamation of sale pending the disposal of his suit.

Held:

[1] The courts are cautious when called upon to exercise the power to grant an interim injunction with regard to a defamation action, and will particularly refrain from doing so when the defence raised is that of justification, fair comment or privilege unless there is strong evidence to show that the words complained of are *prima facie* libellous and untrue. The proclamation complained of, in the instant case, was an advertisement published in the STAR in accordance with its usual day

to day transactions. In the absence of evidence to substantiate the plaintiff's contention that the proclamation was untrue and published out of malice, the defendants' plea of qualified privilege would *prima facie* be a *bona fide* defence for refusing to grant the interim injunction sought. (pp 772 b-774 a)

[2] The remedy sought here (being discretionary in nature) should not be made available to a litigant who sleeps on his rights. The plaintiff who was so concerned with his reputation, ought to have moved with alacrity upon being made aware of the proclamation which allegedly tarnished his good name. Instead he came to court after a prolonged slumber of 40 months. In the absence of a plausible explanation this was inexcusable. (pp 774 f -775 c)

[3] Although it is a common practice that an applicant for an interlocutory injunction should provide an undertaking for damages, it is not a mandatory statutory requirement. (pp 775 h -777 a)

Per curiam

[1] Order 29 r. 1(2) of the Rules of the High Court 1980 ('RHC') stipulates in no uncertain terms that the mode of application to seek an interlocutory injunction is by way of summons. The plaintiff had moved by way of *inter partes* originating motion. This was a breach of a mandatory statutory requirement which was not curable under O. 2 of the RHC and was therefore fatal. (p 777 b - f)

[Application for injunction dismissed with costs.]

Case(s) referred to:

Allen v. Jumbo Holdings Ltd [1980 2 All ER 502 ***(refd)***

American Cyanamid v. Ethicon Ltd [1975] 1 All ER 504 ***(refd)***

Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd [1993] 1 CLJ 487 ***(foll)***

Best Electronics Sdn Bhd v. Chen Li Yeng [1997] 1 CLJ Supp 572 ***(foll)***

Bonnard v. Perryman [1891] 2 Ch 269 ***(refd)***

Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 ***(not foll)***

Coulson v. Coulson [1887] 3 TLR ***(foll)***

Delbert-Evans v. Davies and Watson [1945] 2 All ER ***(foll)***

Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd [1980] 2 MLJ 297 ***(refd)***

Hj Wan Habib Syed Mohamed v. Datuk Patinggi Hj Abdul Taib Mahmud & Anor [1986] 2 CLJ 115 ***(foll)***

Keet Gerald Francis Noel John v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 ***(foll)***

Lim Hean Pin v. Thean Seng Co Sdn Bhd & Ors [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745 ***(foll)***
Lim Kit Siang v. United Engineers (M) Bhd & Ors [1988] 1 MLJ 50 ***(refd)***
Mogul Steamship Company v. M'Gregor, Gow & Co [1885] QBD vol 15 ***(refd)***
Murray Hiebert v. Chandra Sri Ram [1999] 4 CLJ 65 ***(foll)***
Noor Jahan Abdul Wahab v. Mohd Yusoff Aman Shah & Anor [1994] 2 CLJ 249 ***(refd)***
Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong [1996] 2 CLJ 283 ***(foll)***
Quartz Hill Consolidated Gold Mining v. Beall [1882] 20 Ch D 501 ***(foll)***
Rajamanikam Adaikalam v. Bolton Finance Ltd [1999] 8 CLJ 491 ***(not foll)***
Seema Development Sdn Bhd v. Mah Kim Chye & Anor [1998] 1 CLJ 174 ***(refd)***
Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Management Pte Ltd [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 ***(refd)***
The New Straits Times Press (M) Bhd v. Airasia Bhd [1987] 1 MLJ 36 ***(refd)***

Legislation referred to:
Defamation Act 1957, s. 12(1)
Rules of the High Court 1980, O. 2, O. 29 r. 1(2), (2A)

Other source(s) referred to:
Gatley on Libel and Slander, 9th edn, p 634
Supreme Court Practice, 1997, vol A, para 29/1/7

For the plaintiff - Ngan Siong Hing; M/s Abbas & Ngan
For the 1st defendant - Harris Ibrahim (Nor Isman); M/s Liza Chan & Co
For the 2nd & 3rd defendants - Bhag Singh; M/s Bhag Sulaiman & Co

Reported by K Ganesh

JUDGMENT

Abdull Hamid Embong J:
In this application the plaintiff sought an interlocutory injunction pending the disposal of this suit to restrain the defendants from, *inter alia*, publishing and communicating a proclamation of sale (the Proclamation) set out in the following words:

PROCLAMATION OF SALE
Between
MBf Finance Berhad Assignee/Lender
And
Ngoi Thiam Woh Assignor/Borrower
NRIC No. 530922-08-5273)

In the exercise of the rights and powers conferred upon the Assignee/Lender under a Loan Agreement Cum Deed of Assignment, both dated 19th November 1994 between the Assignor/Borrower and the said Assignee/Lender, it is hereby proclaimed that the Assignee/Lender with the assistance of the undermentioned Auctioneer:-

a

WILL SELL BY
PUBLIC AUCTION

On Friday the 23rd day of January, 1998
In the premises at No. 117, 1st Floor
Bangunan Persatuan Melayu
b Jalan Macalister, 10400 Pulau Pinang.

The subject property is a hotel suit known as No. 4, on the 5th Floor of Sandy Bay Paradise Hotel, Jalan Tanjung Bungah, Penang.

Particulars of Title

c Title: No individual title

Floor Area: 70.14 square metres (755 square feet)

Beneficial Owner: Ngoi Thiam Woh

Encumbrances: Assigned to MBf Finance Berhad.

d Location and Description of the property: The subject property is a one bedroom hotel suite within Sandy Bay Paradise Hotel which is located on the north side of Jalan Tanjung Bungah at about 10 kilometres north-west of the City centre and a kilometre east of Tanjung Bungah town. The subject property accommodates a living/dining area, a kitchen, a bedroom, a bath/w.c. and two balconies.

e Reserve price:

The property will be sold subject to a reserve price of RM275,000 (Ringgit Malaysia: Two Hundred And Seventy Five Thousand Only).

f All intending bidders are required to deposit with the Auctioneer a sum equivalent to 10% of the reserve price by bank draft in favour of Messrs. Maxwell, Kenion, Cowdy & Jones before the auction sale. For further particulars please apply to Messrs. Maxwell, Kenion, Cowdy & Jones at Wisma Makencone, No. 31 Jalan Tun Sambanthan, 30000 Ipoh, Perak Darul Ridzuan Tel 05-2551225 or to the undermentioned Auctioneer.

77-C Jalan Datuk Haji Eusoff, M. Mogan
Damai Complex Licensed Auctioneer
g 50400 Kuala Lumpur.
Tel: 03-4427528/Atur: 012-3374424 Or

SYARIKAT DAYA MAJU
No. 117, 1st Floor, Bangunan Persatuan Melayu
Jalan Macalister, 10400 Pulau Pinang.
h Tel: 04-2287270.

The plaintiff is a businessman and the sole distributor of a wide range of health and skin care products. He was also formerly a member of Parliament and a State Assemblyman. The first defendant (CTOS) is a computer database information company which collates information from

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newspapers, government gazettes, the registries of businesses and companies etc and stores them into its electronic archive for the information of its customers which include banks. The second defendant, Star Publications Bhd. (Star) is the publisher of a popular daily national tabloid who first published the Proclamation in its newspaper on 9 January 1998. The third defendant (Star Papyrus Printing Sdn. Bhd.) is described as the printer of the Star.

The plaintiff had in May this year filed this suit against the defendants seeking damages for defamation and for the injunctive reliefs. The Proclamation was first published in the Star and that publication was picked up by CTOS and fed into its database for distribution to its customers. Learned counsel for the plaintiff submitted that since the information remained on CTOS's database and that it has a website which can be assessed worldwide, the plaintiff being a businessman with overseas interest would face hardship and be permanently disgraced if the publication of that information is not stopped forthwith. He also submitted that further publication of the information tantamounts to a sub judice act by CTOS since there is now a related defamation suit in the Penang High Court (Penang suit) involving the same parties. Learned counsel also contended that it falls upon CTOS to prove that the information published in its database is true.

The defence had raised two preliminary objections to this application, which after hearing, this court had decided to treat them as substantive arguments affecting the merits of the plaintiff's application. Firstly, it was submitted that the affidavit in support did not offer any undertaking for damages. Secondly, it was submitted that there had been a long delay of 40 months in seeking for this injunctive relief, a delay for which there was no plausible explanation.

On the sub judice point it was argued by the defendants that this amounted to a criminal contempt, which is the domain of the Attorney General and the proper recourse is to move the Penang High Court to cite CTOS for contempt.

The test for publication contempt is laid down in the recent Court of Appeal decision in *Murray Hiebert v. Chandra Sri Ram* [1999] 4 CLJ 65 which is "if it is likely or tends to interfere with the proper administration of justice". Although it was held in that case that *mens rea* is not a necessary ingredient, the Court of Appeal had cited with approval the words spoken by Lord Parker CJ in *Delbert-Evans v. Davies and Watson* [1945] 2 All ER who said:

> ... whether at the date of publication of the article in question was calculated to prejudice the fair hearing of the proceedings.

The test is to be applied and analysed to the whole article, in the instant case, the Proclamation. The plaintiff had not adverted to any part of the Proclamation to say that it was published in order to prejudice the fair hearing of the Penang suit, and thus, contemptuous. The original Proclamation, as advertised in the Star, was published prior to the filing of the Penang suit and obviously cannot be said to likely prejudice the proper administration of that suit. If assuming that its continuing publication by CTOS would now offend the test, the Proclamation would still in my view require the scrutiny of the court with the proper jurisdiction to evaluate this issue. In my view, that forum is not here since the jurisdiction of this court, for the moment, is not in dealing with the issue of sub judice. In any event a cursory reading of the Proclamation does not show that it is likely to interfere or impede with the Penang suit. The plaintiff too had not shown to this court – and the burden is his – which part of the Proclamation would likely prejudice and how it would intrude into the Penang suit. To me, this thus, is truly a non-issue.

It was also submitted by the defence that the words complained of as being defamatory of the plaintiff were not disclosed in the supporting affidavit. The defence had adverted to the phrases "these publications", "such information" and "such unjustified and false publications", stated in the plaintiff's affidavit as being too general and without particularisation of the specific allegation of defamation and as such the supporting affidavit did not disclose the facts and ingredients to found the injunctions sought. I do not propose to deal with this issue in this proceeding as I feel that it be best left for the trial court when determining the suit proper and when the merits of the action can be fully adjudicated. It would not be appropriate for this court to express any opinion upon the merits of this suit at this juncture. Furthermore, the disposal of this application is sufficiently grounded on other considerations, as discussed below. Lastly, it was submitted by the defence that interlocutary injunctions in defamation suits should not be readily granted since it transgressed one's right to free speech. The defence also contended that the burden is on the plaintiff to show that the information published is untrue.

The primary issue for determination turns out to be whether this court may grant an interim injunction in a defamation action. Therefore, I take the last point first. This court subscribes to the view that it should be slow in granting an interim injunction in a defamation action. In the Supreme Court's case of *The New Straits Times Press (M) Bhd v. Airasia Bhd*

[1987] 1 MLJ 36, the respondent had applied for an interim injunction to restrain the appellants from publication of articles or words allegedly defamatory of the respondent which the High Court allowed. On appeal, it was held by the Supreme Court that the learned judge had erred in law when he exercised the power to grant the interlocutory injunction contrary to the established principle governing the issue of interim injunctions in libel actions. The Supreme Court in coming to its decision had cited a passage from *Bonnard v. Perryman* [1891] 2 Ch 269 where Lord Coleridge CJ had said:

> The right of free speech is one which it is for the public interest that individuals should possess, and indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions. We entirely approve of, and desire to adopt as our own, the language of Lord Esher, M.R. in *Coulson v. Coulson* – 'To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury have decided whether is was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only to be exercised in the clearest cases, where any jury would say that the matter complained of was libellous, and where, if the jury did not so find, the Court would set aside the verdict as unreasonable.

The Supreme Court in the concluding paragraphs of its judgment made the following observations on the principle guiding the grant of an interlocutory injunction in a libel action:

> The principle has clearly emerged by reason of the fact that the questions of libel or no libel are eminently matters to be decided on facts at the trial and there is also the question of the proper meaning to be assigned to the words used in a particular statement. To restrain a defendant before the questions are determined would amount to fettering with free speech. Indeed it is because of the importance of leaving free speech unfettered that the Court must be slow in issuing interim injunction in a libel action.
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> In applying these principles, value is placed by the Court upon the freedom of speech which is related to the freedom of the press when balancing it against the reputation of a single individual who, if wronged, can be adequately compensated in damages. The Court should act cautiously in granting an interim injunction to restrain publication of an alleged defamatory statement. In fact it should not grant the injunction where the defendant says he is going to justify it at the trial of the action except

> where the statement is obviously untruthful or where the plaintiff has satisfied the Court that the defence will fail. That was made clear by Denning M.R. in *Harakas v. Baltic Exchange*.

The principle also shows that no interim injunction shall be granted if the defence raised is that of justification, fair comment or privilege (*Quartz Hill Consolidated Gold Mining v. Beall* [1882] 20 Ch D 501). In the instant case, the second and third defendants had also in their defence raised the plea of privilege, which, according to the principle so strongly advocated by our highest court, must seemingly, be a bar to a free grant of an interim injunction unless the statement is 'obviously untruthful'. It should also be noted here that the Supreme Court also held that the guidelines governing the grant of interlocutory injunctions enunciated by the House of Lords in that celebrated case, *American Cyanamid v. Ethicon Ltd* [1975] 1 All ER 504, are not applicable in actions for defamation.

In *Gatley on Libel and Slander* the learned authors opined that the jurisdiction of the court to grant an interim injunction in defamation actions is of a delicate nature and will only be exercised with great caution. It will not be exercised unless there is a strong *prima facie* evidence that the statement complained of is untrue. In *Coulson v. Coulson* [1887] 3 TLR Lord Esher MR said that 'the court must be satisfied that, in all probability the alleged libel is untrue'. Now, even if this court is satisfied that the words complained of are *prima facie*, libellous and untrue, it would still refuse to grant an interim injunction if those words are *prima facie* privileged unless it found that the defendants were actuated by malice. It seems to me that the plaintiff here needs to overcome these two hurdles ie, one to prove that the statement was untrue and secondly, in the face of the plea of qualified privilege by the second and third defendants, that these defendants were actuated by malice. And, from the authorities, this burden of proof falls upon the plaintiff, and not on the defendants to prove otherwise, as was incorrectly contended by plaintiff's counsel. As for the continuing publication of the statement by CTOS, this court must be satisfied that immediate and irreparable injury will result to the plaintiff in order to allow the granting an interim injunction.

In *Mogul Steamship Company v. M'Gregor, Gow & Co* [1885] QBD Vol 15 p 476, Lord Coleridge CJ, stated his views on this consideration in the following passage:

> Next, this does not appear to me to be a case in which, as I was at one time inclined to think, the plaintiffs can sustain irreparable injury by our declining to grant the relief prayed. It may be that they will suffer some damage; it may be that they will for a time have a difficulty in carrying on their China trade, or may have to carry it on at a loss. But injury of

> that sort differs altogether from the injury which is called "irreparable", to prevent which injunctions have heretofore been granted in the Court of Chancery, and are now allowed to issue from this Court. For instance, if a fine old ornamental tree in a nobleman's park be cut down, the injury is practically irreparable, and cannot be compensated in damages. It is in cases of that nature that an interim injunction issues. The injury here, if it be made out, obviously is not one of that character.

The issues stated above are questions of facts to be determined at the trial proper. The Master of the Rolls in *Coulson*'s case puts it this way:

> To justify the Court in granting an interim injunction it must come to a decision upon the question of libel or no libel, before the jury decided it was a libel or not. Therefore the jurisdiction was of a delicate nature. It ought only be exercised in the clearest cases, where any jury would say the matter complained of was libellous, ...

(see also *Bonnard v. Perryman* [1891] 2 Ch D 269).

The Proclamation complained of is, on the face of it, a usual advertisement published in the Star, pursuant to its normal day to day transaction. The plaintiff had not satisfied this court that the Proclamation was published out of malice. The plea of qualified privilege by the second and third defendants should therefore be considered by this court as a *prima facie bona fide* defence in refusing the grant of an interim injunction. Section 12(1) of the Defamation Act 1957 provides that:

> 1) Subject to the provisions of this section, the publication in a newspaper of any such report or any other matter as mentioned in Part I of the Schedule to this Act shall be privileged unless the publication is proved to be made with malice.

The question on whether that defence is justiciable or will succeed or not is a matter to be decided later by the trial judge whose duty is to evaluate the evidence. For the moment it is only necessary for this court to determine whether the Proclamation is obviously untrue, which I find it not to be.

On the principle referred to above which had stood over a century and sanctioned here by our Supreme Court in *Airasia*'s case, this court, on this ground alone, is constrained to dismiss this application. It seems to me that the thrust of the principles enunciated by those illustrious authorities is rooted in the importance attached to the right of free speech. Seemingly too, this category of interim injunctions stands apart and do not fall within the principles established in the applications for interlocutory injunctions by *American Cynamid* where the court need not consider the merits of the

case once it had been shown there was a serious issue to be tried but to determine where the balance of convenience lay between the parties. (see *Si Rusa Beach Resort Sdn Bhd v. Asia Pacific Hotels Managements Pte Ltd* [1984] 2 CLJ 13; [1984] 1 CLJ (Rep) 346 per Abdul Hamid, CJ, see *Gatley on Libel and Slander*, 9th edn. p 634).

From those authorities, it would seem that the court may only grant interlocutory injunctions of this species if the following factors, as summarised in Gatley on *Libel and Slander*, are satisfied:

(1) that the statement is unarguably defamatory.

(2) there are no grounds for concluding that the statement may be true.

(3) there is no other defence which might succeed.

(4) there is evidence of an intention to repeat or publish the defamatory statement.

In the instant application, the plaintiff had failed to satisfy this court of all of the first three factors abovestated.

I need also to briefly deal with two other issues raised as preliminaries by the defence. The first is the question of delay by the plaintiff in making this application. It is settled law that delay on the part of the plaintiff in seeking an interlocutory injunction may throw considerable doubt on the reality of his alleged injury (see *Noor Jahan bt Abdul Wahab v. Mohd Yusoff bin Aman Shah & Anor* [1994] 2 CLJ 249).

The plaintiff had come to know of the Proclamation almost immediately after its publication in the Star on 9 January 1998 when, in March of that year, he was warned by the then Bank Bumiputra Malaysia Bhd. that his facilities might be terminated in view of his financial predicament as adverted to in the Proclamation. Surely then, as a businessman who is concerned about his reputation, he must have been alerted to the consequence of the Proclamation and should have taken immediate steps to stop it from jeopardising his good name. Now, some 40 months later he is before this court complaining about the publication of this very Proclamation and seeking to restrain the defendants by way of an interim injunction. Learned counsel for the plaintiff had submitted that the suit against the defendants was filed in May this year and that the plaintiff was well within the statutory limitation period. That may be so, but the complaint here is in my view a most grave and pressing matter, as is now impressed upon this court by the plaintiff in his own application, and surely, one that requires immediate attention and compelling action. The

plaintiff in my view, need not have waited until after the writ was filed to seek this interlocutory relief. He should have acted promptly upon the Proclamation coming to his knowledge.

The remedy sought here is left to the court's discretion, and as such, even assuming there is now a further need to consider the balance of convenience factor under the *American Cynamid* principles, in deciding this application, this court is entitled to take into account all discretionary considerations such as delay in the making of this application. (see *Keet Gerald Francis Noel John v. Mohd Noor @ Harun bin Abdullah & 2 Ors* [1995] 1 CLJ 293). The Supreme Court in *Haji Wan Habib Syed Mohamed v. Datuk Patinggi Abdul Taib Mahmud & Anor* [1986] 2 CLJ 115; [1986] CLJ (Rep) 149 had stated that discretionary remedies being exceptional in nature, should not be made available to those who sleep on their rights. In the instant case, the plaintiff's prolonged slumber of some 40 months is certainly inexcusable.

In *Evercrisp Snack Products (M) Sdn Bhd & Anor v. Sweeties Food Industries Sdn Bhd* [1980] 2 MLJ 297, an application for an interlocutory injunction was objected to on the ground of delay of some 22 months, which had not been explained in the plaintiff's affidavit. Hashim Yeop A. Sani J (as he then was) held that there was unreasonable delay for which no satisfactory explanation was given and dismissed the motion. Similarly in the instant case, no explanation was given in the plaintiff's affidavit as to why there was this long delay in making this application. This is certainly not helpful to his present cause.

In *Best Electronics Sdn Bhd v. Chen Li Yeng* [1997] 1 CLJ Supp 572, there was a 16-month delay in making an application for a Mareva injunction, it was held by the High Court that the plaintiff ought to have moved with promptness and alacrity, that such a delay may give rise to an inference that the plaintiff had not suffered hardship or prejudice. (see also *Lim Hean Pin v. Thean Seng Co Sdn Bhd & 6 Ors* [1992] 2 CLJ 828; [1992] 2 CLJ (Rep) 745). I fully agree with the abovecited decisions and for this reason too, this application ought to be dismissed.

Next, the issue of giving an undertaking or more aptly in this case, the failure by the plaintiff to give one. Learned counsel for the defendants had questioned the omission by the plaintiff to give an undertaking for damages in his supporting affidavit. The case of *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 was referred to in support of this argument. In that case the learned judge had said that "an undertaking by a plaintiff as to damages ought to be given on every interlocutory injunction" and had referred to some English authorities. It

should however be observed and with greatest respect, that firstly, the learned judge never held that an undertaking is a prerequisite and without one the interim injunction asked for should be withheld. Secondly, his Lordship in my view, was merely stating the usual practice of the courts when granting interim injunctions but had not referred to or discussed the regulatory need of such an undertaking under our Rules of the High Court 1980 (RHC). This case thus is of no assistance to the proposition by the defence and my research shows none to say that it is a mandatory statutory requirement and one that needs to be averred by the plaintiff in either his supporting affidavit or application. In *Rajamanikam Adaikalam v. Bolton Finance Ltd* [1999] 8 CLJ 491, the High Court had held that it is trite law that an applicant for an interlocutory injunction must give his undertaking to damages in the said application. That view was taken based on English authorities which recognised the practice in England since the middle of the 19th century to grant interlocutory injunctions subject to the giving of an undertaking to pay damages. The High Court in coming to its conclusion had not considered this requirement under our RHC and, with greatest respect, that decision should be treated as one *per incuriam* on this question, and from which is now differed.

Indeed, O. 29 r. 1 RHC does not provide for such a requirement. Nor, under r. 1(2A), for the affidavit in support, is there a requirement for an applicant to declare an undertaking. However, as correctly pointed out by plaintiff's counsel, Form 58, ie, the form for an order for interim injunction shows that the court, in its discretion, may order that the plaintiff gives an undertaking as to damages. This order on an undertaking may, in my view, be made by the court if it is of the opinion, after enquiring into the matter that a defendant would sustain some damages as a result of the injunction granted. Clearly then, this order on the undertaking is left to the court's discretion. The omission to provide for an undertaking for damages in the plaintiff's affidavit or his application is thus, in my view, not fatal, and that under the RHC, it is a non-mandatory requisite although the general practice, with some exceptions (eg, in public interest litigation – see *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1988] 1 MLJ 50 or where the Government is seeking for the injunction) is for the court to require that such an undertaking be given. Being a discretionary remedy and one founded on equity, the court must have regard to the essential justice of the case. An undertaking including a cross undertaking, may be orally requested by either party during the proceedings, or the court itself in the exercise of its discretion, may embark on an enquiry on the need of such an undertaking. Even in a Mareva injunction situation, an

undertaking is flexible in its application (see *Seema Development Sdn Bhd v. Mah Kim Chye & Anor* [1998] 1 CLJ 174, and *Allen v. Jumbo Holdings Ltd* [1980] 2 All ER 502).

A more pertinent matter however and one not raised in submission, is the mode of the application made by the plaintiff to secure this interim injunction. This court in the instant application was moved by an *inter partes* originating motion. Order 29 r. 1(2) says that:

> Where the applicant is the plaintiff and the case is one of urgency such application may be made *ex parte* by summons supported by an affidavit but, except as aforesaid, **such application must be made by summons.** (emphasis added)

Clearly therefore, the application before this court is defective, and one wanting in procedure. Similarly, in England, in the QBD, there is no machinery to enable the plaintiff to apply for an interlocutory injunction by a motion to a judge in open court. (see the *Supreme Court Practice* 1997 vol. A para 29/1/7). It is now trite law that the qualifying word 'must' under the RHC assigns to it a mandatory requirement (see *Perbadanan Nasional Insurans Sdn Bhd v. Pua Lai Ong* [1996] 2 CLJ 283). It need not be overly emphasised that an application that fails to comply with a mandatory procedural requirement is fatal and could not stand. It is my finding therefore, that a fundamental breach of an expressed requirement has occured and one not curable under O. 2 RHC. (see *Asia Commercial Finance (M) Bhd v. Kimden Housing Development Sdn Bhd* [1993] 1 CLJ 487. It is unfortunate that this matter was not earlier brought to the court's attention for, if it had been, a summary striking out of this motion would not have been inappropriate in the circumstance.

For these reasons, this application is dismissed with costs.